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Supreme Court of the United States

October Term, 1952

No. 311

AGRA B. WILLIAMS,
Petitioner,

v.

PROTESTANT EPISCOPAL THEOLOGICAL SEMINARY IN VIRGINIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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Supreme Court of the United States

October Term, 1952

No. .....

AGRA B. WILLIAMS,

Petitioner,

v.

PROTESTANT EPISCOPAL THEOLOGICAL SEMINARY IN VIRGINIA, and AMERICAN SECURITY AND TRUST COMPANY, a corporation, EXECUTOR OF THE ESTATE OF MARY E. MAXWELL, deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Agra B. Williams, respectfully prays that a writ of certiorari be isued out of and under the seal of the Court to review the decision of the United States Court of Appeals for the District of Columbia Circuit, hereinafter referred to as Court of Appeals, rendered on the 12th day of June, 1952, (R. 81-86) which in turn affirmed the judgment of the United States District Court for the District of Columbia, filed on July 24, 1951,

(R. 76-77), and the order entered on the 19th day of July, 1951, (R. 77-78).

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U. S. C. No. 1254 (1).

The opinion of the United States Court of Appeals for the District of Columbia Circuit was filed on the 12th day of June, 1952, (R. 81-86). Orders staying a mandate to the thirtieth day of August, 1952, pending the filing of this petition for certiorari have been entered.

OPINION BELOW

The opinion of the District Court is found on page 62, et sequi, of the proceedings in the Circuit Court of Appeals. The conclusions of the District Court are found on pages 63-66 Id. and the order denying any recovery by Agra B. Williams on her motion for declaratory judgment and granting the cross motion for defendant, Protestant Episcopal Theological Seminary of Virginia, is found on pages 69 and 70 of the record. This opinion is not yet reported in the Federal Supplement.

The opinion of the Court of Appeals is found in the record. It was heard before Judges Proctor, Fahy and Washington and afterwards decided on June 12, 1952. The opinion has not yet been reported in the Federal Reporter, but it is printed in the record (R. 76-78).

QUESTIONS PRESENTED BY THIS PETITION

The questions presented here were raised in a declaratory judgment suit brought by petitioner, and by cross motion by respondent, Protestant Episcopal Theological Seminary in Virginia. The American Security and Trust Company has occupied a mere nominal position as a

party since the beginning of this litigation. It has been, more or less, an innocent by-stander. Hence, herein, when we refer to respondent, we mean the Theological Seminary. Both Courts below decided in favor of respondent.

Both the District Court and the Court of Appeals decided in this case that the Virginia law applied; but neither of them determined the questions of law accordingly.

The questions presented by this petition are:

(1) The Court of Appeals, except inferentially, did not pass upon the question whether the affidavits filed by respondent in support of its counter-motion for summary judgment could be considered by it over our objection, under Rule 56 (c) Federal Rules Civil Procedure. It is apparent that both the District Court and the Court of Appeals considered these affidavits and the so-called facts covered by them, when as a matter of law none of them, except, perhaps, the charter of respondent or so-called amendments from 1923, forward should have been considered on the motion.

2. Can the Virginia Theological Seminary in Virginia legally take by devise or bequest under the laws of the Commonwealth of Virginia? If it cannot take, then petitioner, as the only heir at law, takes.

3. Did the Court of Appeals follow the law of Virginia, as set out in its statutes and the decisions of the Supreme Court of Appeals of Virginia? It decided this case on its own conception of what it considered the law of Virginia ought to be, and which it is not.

4. Can respondent legally take under the non-stock corporation statute in Virginia? Isn't it bound by the general statute relating to devises and bequests for religious purposes and not otherwise?

5. Can respondent legally take under its charter, since the charter is silent as to the purposes of the corporation and of the right to take. The record here shows that the deficiencies of its incorporation are basic?

VIRGINIA CODE AND STATUTES INVOLVED

Sec. 154, Virginia Constitution, 1902
Report of Revisors of Virginia Code, chapters 77, 80, 1849.
Title 22, c. 77, Code of 1849
Report of Revisors as to c. 11, Acts 1839
Code of 1860, c. 80
Code of 1887, sec. 1420, 1426
Code of 1904, sec. 1419
Code of 1936, 1942, sec. 587, c. 32
Code of 1950, Vol. 8, title 55, sec. 55-26
Code of 1919, sec. 6
43 Elizabeth repealed 1792
Act January 24, 1799
Act January 12, 1801
Acts 1853-4, c. 107
Act December 16, 1875
Act March 25, 1873
Acts 1883-84, c. 523

RULES OF COURT

Rule 56 (c) and (e) Federal Civil Rules Procedure.

STATEMENT OF CASE

Early in 1949, Miss Mary E. Maxwell, a resident of the District of Columbia for many years, died, leaving a last will and testament, which was duly probated.

The defendant, American Security and Trust Company, qualified as executor. Under the twenty-seventh clause of her will, Miss Maxwell divided her residuary estate,

which consisted solely of personalty, into two parts—one-half, she bequeathed to Virginia Military Institute, and the other half she bequeathed to Protestant Episcopal Theological Seminary, both in trust. (R. 3-4).

Petitioner moved the District Court, if his finding should be for the Seminary, to state whether it took by virtue of the common or statute law of Virginia, and under what statutes it could take. The District Court did not directly answer this query. The Court of Appeals says respondent took under Sec. 587 of the Code of 1919 (R. 84). The Court of Appeals affirmed the District Court (R. 81 et seq.), held in substance that a corporate theological seminary had a right to take by devise or bequest in Virginia as an educational or charitable beneficience, and that the other points of error raised by petitioner, to-wit: (a) objection to the use of the affidavits, (b) whether respondent could take as a non-stock corporation or under its supposed charter, were not meritorious. (See last sentence of opinion (R. 86).

Hence this application for a writ of certiorari.

SPECIFICATIONS OF ERRORS TO BE URGED

The Court of Appeals erred as follows:

(1) In considering any part of the affidavits, except the so-called amendments made after petition by the Corporation Commission of Virginia of July 31, 1923.

(2) In determining that the respondent could legally take by devise or bequest under the laws of the Commonwealth of Virginia.

(3) In refusing to follow the law of Virginia in force at the time this will took effect, and as interpreted by the decisions of the Supreme Court of Appeals of Virginia.

(4) In determining in effect that respondent could take under the non-stock corporation law of Virginia and was not bound by the law relative to bequests for religious purposes as defined by the Virginia law.

(5) In determining that respondent could legally take under its charter since the charter is silent as to the purposes and right to take and since the deficiencies of respondent's incorporation are basic, and it has not complied with the basic rules laid down by the Virginia statute to insure its incorporation as a non-stock corporation.

REASONS RELIED UPON FOR GRANTING THE WRIT

The United States Court of Appeals for the District of Columbia Circuit has failed to apply the Virginia statutes and to follow the Virginia decisions in its determination of a question of law that should be controlled entirely by the law of the State of Virginia. Thus, although the assets of the estate being administered are located in the District of Columbia, the question as to the legality of the beneficiary receiving the bequest is one to be determined solely by the law of the State of Virginia. The Court of Appeals so decided. In its failure, however, to follow the law of the State of Virginia on this question, the Court of Appeals has, in effect, re-written the law of the State of Virginia with respect to the ability of a theological seminary to take under wills, thereby usurping functions of the General Assembly of Virginia and the Virginia courts. The resulting confusion and error have caused serious loss to your petitioner and renders uncertain the administration of estates not only in the State of Virginia but elsewhere, as in the instant case, and particularly in the District of Columbia, where numbers of Virginia estates are administered by trust companies here domiciled. Because, too, there is now a variance between the Virginia law, as declared by its statutes and interpreted by its courts, and as interpreted

by the courts of the District of Columbia, this becomes a matter of public interest that should be definitely and finally settled.

Because of the long history of the statutes involved and the many amendments and cases construing them, this brief is more verbose than it would otherwise be. The indulgence of the Court is, therefore, requested.

(1) Were the Affidavits Filed by the Defendant in Support of Its Counter-Motion for Summary Judgment in Proper Form as Required by Rule 56 (c) Federal Rules Civil Procedure so as to be Properly Considered?

Being a question of adjective law, as distinguished from subjective principles, this part of this matter must be determined by the rules of the Federal Court in the District of Columbia.

To sustain its motion, appellee filed a number of affidavits, (R. 16-20), only part of one of which we respectfully submit was in proper form or content to be considered by the trial court or the Court of Appeals in arriving at their respective conclusions. This had reference to the basic charter from 1923 forward. Those, which we submit were not proper in that regard, are treated briefly hereafter. Petitioner moved to strike the same in due time. This motion was never passed upon by the judge of the trial court. In his written memorandum opinion, the trial court made no reference to the facts contained in the affidavits, but if these facts were taken into consideration by him, or the Court of Appeals, and from the opinion of the latter, they had to be, palpable error is present.

It is too well settled not only in this Court but everywhere throughout the Federal Judiciary that in order to properly obtain declaratory judgment under Rule 56 (c), the record before the Court at the time of the motion, including the pleadings, depositions and affidavits must

show clearly that "there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law." These affidavits attempt to raise quesions of fact and should have been affirmatively disregarded, because they did not show any *personal* knowledge of the facts contained in them.

Farrall v. *D. C. Amateur Athletic Union*, 80 U. S. App. D. C. 396, 153 F. (2d) 647, held that affidavits may be used *for the purpose of discovering whether there is an issue of fact, but not for the purpose of deciding an issue of fact.*

See, also, *Fox* v. *Johnson Wimsatt*, et al., 31 F. Supp. 64.

In that case, as here, it was sought to prove by irrelevant and immaterial evidence facts not admissible in any event.

For the reasons herein stated, we respectfully urge that the affidavits referred to above should not have been considered. It is evident that the District Court, (R. 65) and the Court of Appeals, (R. 84-86) took these affidavits and the exhibits attached into consideration.

See, also, discussion under Specification of Errors, points 4 and 5 herein.

(2) Can Virginia Theological Seminary in Virginia Legally Take by Devise or Bequest Under the Laws of the Commonwealth of Virginia? If it Cannot Take, then Petitioner, as Only Heir at Law, Takes.

(3) Did the Court of Appeals Follow the Law of Virginia, as Set Out in its Statutes and the Decisions of the Supreme Court of Appeals of Virginia, or Did it Decide This Case on its Own Conception of What it Considered the Law of Virginia Ought to Be, and Which it Is Not?

(a) *Can Respondent Take Under the Common Law?*

A charitable bequest in Virginia is void at common law. If the Statute of 43 Elizabeth, relating to charitable uses, was ever in force in Virginia, it was repealed by the Virginia statute of 1792.

Gallego's Exor. v. *The Attorney General,* 3 Leigh 450, (1842)
Fitzgerald v. *Doggett's Exor.* (1930) 155 Va. 112, 155 S. E. 129, especially at page 132.
Triplett v. *Trotter* (1937), 169 Va. 440, 193 S. E. 514-516
Kelly v. *Love's Administrators,* (1870), 20 Grat. 124.

(b) *Is There Any Statute in Virginia Abrogating or Changing the Common Law Rule and Permitting Respondent to Take by Devise or Bequest?*

It is imperative that the history of Virginia legislation should be taken into consideration.

Thomas Jefferson's statute for establishing religious freedom was passed on December 16, 1785. It was followed by the Act of 1798, chapter 9 (January 24, 1799.) Under this act, many of the Acts previously passed, including an act for incorporating the Protestant Episcopal Church, and an act giving certain powers to the trustees of the property of the Protestant Episcopal Church, were repealed, and the Bill of Rights was declared to be a true exposition of the principles of the Bill of Rights and the Constitution.

This statute was followed by the Act of 1801, c. 5, confiscating all the vacant glebe lands in the State, formerly belonging to the established church, and turning them over to the Overseers of the Poor.

Following *Literary Fund* v. *Dawson,* (1839) 10 Leigh 147, the General Assembly passed the Act of 1839, c. 12, on April 2, 1839, the seventh section of which, hereafter quoted, is of material moment in this case.

The legislative policy is best illustrated by the Revisors' report of the Code of 1849, with relation to section 8, of chapter 77, which permitted grants or devises of land for the use of any religious congregation, "or for religious or other instruction", etc. to be held. The General assembly struck out these latter words and passed the statute with this particular language out of it.

Again, the Report of the Revisors amended the act of 1839 above, by incorporating in the Code (Title 23, Chapter 80, Code of 1849) after the words "other than for the use of a theological seminary", the words "or purposes of religious education." This language was incorporated in the Code as "other than for the use of a theological seminary."

This language was carried into the Virginia Code of 1860. It was amended by the Act of March 25, 1873, to include colored persons, but the language "other than for the use of a theological seminary" was still retained.

Following Kain, *Bishop of Wheeling* v. *Gibboney, Exor.*, (1870), 11 Otto 362, 25 L. Ed. 813, evidently the General Assembly observed a shortcoming in the statute, which then provided for a trust made to a body corporate or unincorporated, or to a natural person, in that it did not cover trusts "for the use of." This was covered by inserting the words, in section 1420, of the Code of 1887, the following:

> "Nothing in this section shall be construed as to give validity to any devise or bequest *to or for* the use of any unincorporated theological seminary."

These words "to or for the use" plug the gap so that no bequest could be made to any person or corporation "to or for the use" of an unincorporated theological seminary.

The language of the 1839 Act prohibited devises or bequests to a theological seminary. This Act, as amended, added devises or bequests "to or for the use."

The Act in force at the time of the death of the testatrix is as follows:

> "Every gift, grant, devise or bequest which, since April second, eighteen hundred and thirty-nine, has been or at any time hereafter shall be made for literary purposes or for the education of white persons within this State, and every gift, grant, devise or bequest which, since April tenth, eighteen hundred and sixty-five, has been or at any time hereafter shall be made for literary purposes or for the education of colored persons within this State, and every gift, grant, devise or bequest made hereafter for charitable purposes, whether made in any case to a body corporate or unincorporated, or to a natural person, shall be as valid as if made to or for the benefit of a certain natural person, except such devise or bequest, if any, as have failed or become void by virtue of the seventh section of the act of the General Assembly passed on April second, eighten hundred and thirty-nine, entitled 'an act concerning devises made to schools, academies, and colleges.' Nothing in this section shall be so construed as to give validity to any devise or bequest *to or for the use* of any unincorporated theological seminary."

The seventh section of the 1839 act, made part of the statute, is as follows:

> "AND BE IT FURTHER ENACTED, That at the term next ensuing the admission of such will to probate, or next ensuing the reception of the said copy of the will and certificate of the probate aforesaid, the said court shall report the case to the legislature, together with the report of the commissioner or commissioners appointed to ascertain the value of the subjects, or estate devised or bequeathed, with any other matter it may think proper. And if the legislature shall refuse at its next session, or fail within two successive sessions after the reception of the said report from the court aforesaid, to incorporate such school, academy or college, the said devise or bequest shall fail and be void. But no act incorporating such school, academy or college, shall take away any right of the heirs or distributees to impeach the

validity of such devise or bequest which they would have had if it had been given or made to any natural person or body incorporated at the time of making the devise or bequest: PROVIDED, *That nothing in this act contained shall be so construed as to give validity to any devise or bequest to any theological seminary.*"

This is the old section 587 found in the several Codes of 1936 and 1942, and is now in the new Code which went into force after Miss Maxwell's death as the Code of 1950, vol. 8, title 55, chap. 2, being section 55-26. (Italics above are those of petitioner.)

Quoting from 2 Lewis' Sutherland Stat. Constr. (2nd Ed.) 787, 788, Mr. Justice Roberts, in *Hassett* v. *Welch*, 303 U. S. 303, 314, 82 L. Ed. 858, 866, said:

"Where one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute. • • • Such adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications of the statute so taken unless it does so by express intent."

See, also, *In re Heath*, 144 U. S. 92, 36 L. Ed. 358, point 2 of syllabus.

In *Commonwealth, ex. rel City of Richmond* v. *Chesapeake & Ohio Railway Company*, (1916), 118 Va. 261, 87 S. E. 622, 626, the law is thus laid down:

"While certain authorities appear to sustain the proposition that an act which has been repealed cannot be amended, these authorities are against the decided weight of authority, and, in our opinion, are unsustained by reason."

See, also:

U. S. v. *The Brazil* (1943) (7th Cir.) 134 Fed. (2nd) 929 (1st point of syllabus.)

The statute under consideration, above, was slightly amended by an act of 1914 which added to the above

statute the words: "and every gift, grant, devise or bequest hereafter made for charitable purposes", before the words "whether made in any case to a body *corporate* or incorporate", etc. Thus it regulated bequests to a corporation such as respondent.

Our contention is that the above act, including the section from the 1839 act, applied only to devises and bequests for literary and charitable purposes and never applied to bequests or devises for theological seminaries, except to forbid them.

In *Kelly* v. *Love's Admr.*, (1870) 20 Grat. (61 Va.) 124, Judge Staples, construing this section seven of the 1839 Act, made part of the statute known as section 587 of the Virginia Code of 1919, and as retained in the 1950 Code, says on page 131;

> "I think the object of the Legislature, in passing the act, was to change the rule laid down in the cases before cited," (Gallego's Exor. v. Atty. Gen., 3 Leigh, 450; Brooke v. Shacklett, 13 Grat. 301; Seaburn's Exor. v. Seaburn, 15 Grat. 423) "controlling bequests and devises for the establishment of schools and colleges, *leaving it in full operation so far as it applied to bequests and devises for religious purposes.*"

Respondent took the position below that because it is a corporation, it can take. This theory was adopted by the Court of Appeals. The rule is not so simple. Bequests to a corporation are confined to bequests for purposes "distinctly defined" in the corporate charter.

To sustain its position that it could take the bequest, respondent cited four cases:

1st. *Roy's Exor.* v. *Rowzie* (1874) 25 Grat. (66 Va.) 599.

This case merely validated a bequest by a testatrix in Virginia to a South Carolina corporation, properly authorized by its charter to take.

2nd. *Protestant Episcopal Education Society* v. *Churchman,* (1885), 80 Va. 718.

This case involved a bequest to a corporation founded in 1875 for the collection of money to be used by the trustees of the corporation for the education of poor young men for the Episcopal ministry. The case attempted to overrule *Gallego* v. *Attorney General,* 3 Leigh, 450, and several other Virginia cases, as well as *Baptist Assoc.* v. *Hart,* 4 Wheaton 1. Tens of pages of opinion might have been saved, for Judge Richardson, who begins his opinion on p. 755, finally says, on p. 782:

> "In this case we have no concern with the *statutory* exception as to a theological seminary, as the bequests here are not to make a seminary."
> All the remainder was and is obiter dicta.
> (*Fifield* v. *Van Wyck* (1887) 94 Va. 557, 27 S. E. 446.)

3rd. *Trustees* v. *Guthrie,* (1889), 86 Va. 125, 10 S. E. 318.

This was a bequest by a Virginia testator to a North Carolina corporation, having for its purpose the power to acquire property, inter alia, for Christian education. The bequest was for general purposes of the charter and not for a theological seminary.

Judge Richardson again wrote the opinion, criticising the several cases decided by this Court and the Virginia court, but is careful to hold that the facts show that the bequest is not to a theological seminary, although he discusses what would happen if the bequest were made to respondent in this case.

Apparently Judge Lewis was not so sanguine even then about Judge Richardson's opinion. See note at end of case on page 326 of 10 S. E.

Here Judge Richardson, interpreting *Roy* v. *Rowzie,* supra, says:

"Roy v. Rowzie, 25 Grat. 612, was the case of a Virginia bequest to a theological seminary chartered by the legislature of South Carolina. The Court held the bequest valid * * *."

4th. *Fitzgerald* v. *Doggett's Exor.* (1930) 155 Va. 112, 155 S. E. 129.

This was not a bequest to or for a theological seminary. It was the bequest for the creation of a fund, by the testator for the relief of superannuated ministers of the Virginia Conference of the Southern Methodist Church. The case is not in point here, although it recognized that an indefinite charity to an incorporated body having the same chartered object and purpose, was good.

Fifield v. *Van Wyck,* (1897), 94 Va. 557, 27 S. E. 446, overruled all the dicta in the *Churchman* and *Guthrie* cases, re-established the cases overruled or attempted to be overruled by these cases. "We are unwilling to hold", said the opinion of the Court, "that this line of decisions, running back over a period of more than 50 years, was overturned by expressions of opinion in the *Churchman* and *Guthrie* cases. If further changes are necessary or desirable upon the subject, the legislature, the law making power, and not the courts, should make them."

The Court of Appeals says that this statute applies only to unincorporated theological seminaries and that the exception above is inapplicable. "From this it follows," says the opinion, "that if the bequest is for either educational or charitable purposes it is valid, unless the reference to bequests which have failed under the Act of 1839, leads to a different result. That the present bequest is for educational or charitable purposes is clear from its terms, considered in conjunction with the character and purposes of the seminary."

Religious purposes have been considered as among charitable purposes and charitable trusts, *except in Virginia.*

2 Bogert on Trusts, sec. 322.

In *Moore* v. *Perkins,* (1937), 169 Va. 175, 192 S. E. 806-810, (on page 810) Judge Hudgins calls attention to the fact that the Legislature, invalidating charitable trusts by adopting the Code of 1849, chapters 77 and 80, and the Code of 1887, chapters 64 and 65, made a marked distinction between trusts for religious purposes and trusts for literary or educational purposes. Said Judge Hudgins, after first holding, page 810, that prior to the *Gallego* case, supra, "no charitable trust was valid in this jurisdiction" says on p. 811, of 192 S. E.:

> "But, as pointed out above, section 587 deals primarily with charitable trusts for literary and educational purposes. The phraseology of the statute, as originally drawn, has been maintained through the successive re-enactments of the Legislature since 1839. Some of the restrictions imposed upon trusts for religious purposes have been eliminated from time to time, but some still remain and are found in the Constitution and in chapter 7 of the Code of 1919. It could hardly be the intent of the Legislature, in the use of the words 'charitable purposes,' as set forth in section 587, to remove all restrictions upon trusts for religious purposes without specifically amending other sections of the Code dealing with that subject."

Commenting on section 587 of the Code of 1919, (Code 1950, vol. 8, title 55, chap. 2, being section 55-26,) Judge Hudgins adopts the language of Harrison on Wills, which is the leading text book authority in Virginia and West Virginia, written decades after the above statute was amended by the addition of the last sentence with relation to trusts for unincorporated theological seminaries:

> "It does not seem to affect religious donations or beneficial orders and associations. It can hardly be supposed that the Legislature intended to repeal the sections which elaborately provide how far religious trusts are valid or trusts in favor of beneficial orders are valid by an amendment *to a section applicable*

only to educational and literary trusts. Therefore it can be safely said that religious donations are not affected by the Act, but are controlled by the sections of the Code specifically made applicable to them." (p. 812 of 192 S. E.)

There is no question but that eleemosynary corporations are permitted in Virginia to take like the one in *Jordan's Administratrix* v. *Richmond Home for Ladies,* 1 Va. App. 117, 56 S. E. 730, if it has the right under its charter, and such devise or bequest is in accordance with the purposes for which it was formed.

In *Maguire* v. *Loyd,* decided on December 3, 1951, 193 Va. 138, 67 S. E. (2d) 885, the Court, speaking through Mr. Justice Smith, had this to say:

"Religious purposes have been considered as among charitable purposes and charitable trusts have been deemed to include trusts for religious purposes in England and in most of our States for many years. See 3 Scott on Trusts, sec. 371; Restatement of the Law of Trusts, sec. 371. But such has not been the situation in Virginia. See 2 Bogert on Trusts and Trustees, sec. 322. In the case of Moore v. Perkins, supra, the opinion, 169 Va., at page 182, 192 S. E. at page 810, refers to the decision in the Gallego case and relates the beginning of the law in this State as follows: 'While the decision makes no distinction between a trust for religious use, and a trust for any other charitable purpose, the evil resulting from trusts for religious purposes was emphasized in the opinion. It was there suggested that, if the people of the Commonwealth desired to legalize any such trust, it should be done through legislative enactment.' Following this suggestion the Legislature, in validating charitable trusts, made a marked distinction between trusts for religious purposes and trusts for literary or educational purposes. See chapters 77 and 80 of the Code of 1849, and chapters 64 and 65 of the Code of 1887."

"The distinction between trusts for religious purposes and trusts for literary or educational purposes

has continued down to the present time. Therefore, our discussion herein will be confined to trusts for religious purposes."

See, also, *Triplett* v. *Trotter,* (1937) 109 Va. 440, 193 S. E. 514, 516.

Even if the Court of Appeals were right, when it determined that the bequest here came under section 587 of the 1919 Code of Virginia, the bequest is invalid because of the prohibition in the seventh section of the Act of 1839.

The statute referred to "body corporate or unincorporated", and referring back to the 1839 Act, excepts "*any* devise or bequest to any theological seminary."

The Court of Appeals says that this language applies only to unincorporated theological seminaries. This is in the teeth of a fundamental rule of construction, and the word "any" in the 1839 Act.

The statute covers *any* devise or bequest to *any* theological seminary. The word "any" is comprehensive. *Warders* v. *Arell,* 2 Wash. (Va.) 282, 298, 299; *Walker* v. *Temple,* 130 Va. 567, 107 S. E. 720.

See Virginia Code of 1942, sec. 5, par. 13 and cases there cited, which was in effect when testatrix died and is now Virginia law.

See, also:

U. S. v. *Amedy,* 11 Wheat. 392, 412, 6 L. Ed. 502, 507.
Beaston v. *Farmers Bank,* 12 Peters 102, 134, 9 L. Ed. 1017, 1030.
Stribbling v. *Bank,* 5 Randolph (Va.) 132.
Crawford v. *Board of Supervisors,* 87 Va. 110, 12 S. E. 147.

We have covered the reason for the last proviso "to or for the use" of any theological seminary following *Kain* v. *Gibboney,* 11 Otto, 302, supra.

Petitioner emphatically urges that the only thing left of the seventh section of the 1839 act is the inhibition of theological seminaries to take by devise or bequest. The reference to it in section 587 is otherwise meaningless.

Following an interrogatory, the respondent admitted that it was a theological seminary, (R. 60).

Next the Court of Appeals holds that the language of the Act of 1839 "have failed or become void" is in the past tense; therefore it cannot help the petitioner here. *No devise or bequest can fail or become void until the time arrives for it to take effect.* Then at that time, the law says, in effect, the bequest becomes void, or shall become void, because the respondent cannot take. In other words, the Court of Appeals says that in the many editions or revisions of the Code of Virginia for the last one hundred years, the General Assembly by incorporating the seventh section of the Act of 1839, has been using meaningless language. It holds in effect that the statute is an absurdity.

The language must be given a sensible construction and application.

Commonwealth v. *Armour,* (1916) 118 Va. 242, 87 S. E. 610. Affirmed 246 U. S. 1, 62 L. Ed. 547.

The history of a statute may be taken into consideration in ascertaining its true meaning. (*U. S.* v. *Lacher,* 134 U. S. 624, 33 L. Ed. 1080; *American Air Lines, Inc.* v. *Battle,* 181 Va. 1, 23 S. E. (2d) 796). The intention of the law makers constitutes the law and the primary object in interpreting a statute is to ascertain that intention. The thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. (*Church of the Holy Trinity* v. *U. S.,* 143 U. S. 457, 36 L. Ed. 226; *Anglin* v. *Joiner,* 181 Va. 660, 26 S. E. (2d) 58.) The real purpose and intention of the Legislature, is the thing to be ascertained

in the construction of a statute, and to effect this, the general meaning of the words may be restricted. (*Orange and Alexandria Railroad Company* v. *Alexandria*, 17 Grat. 176.) All of the provisions of the statute must be given effect, (*American Air Lines* v. *Battle*, supra) and the Court will not hold any sentence, clause or word as unmeaning or surplussage if a construction can be legitimately found which will give force to and preserve all of the words of the statute. (*King* v. *Empire Collieries Co.*, 148 Va. 585, 139 S. E. 478.) A Court will not be prevented from giving effect to a legislative intention of which it is satisfied by a too rigid adherence to the very word and letter of the statute. (*Barrett* v. *Van Pelt*, 268 U. S. 85, 69 L. Ed. 857.) If in giving grammatical effect, a section or sentence is ambiguous, the application of grammatical rules will not be permitted to defeat the purpose of the act, if otherwise ascertainable. (*Harris* v. *Commonwealth*, 142 Va. 620, 128 S. E. 578.) In construing a statute, the old law, the mischief and the remedy must be considered and the statute under consideration must be given an interpretation, if possible, which will suppress the mischief and advance the remedy. (*Newton* v. *Employers Liability Assurance Corporation*, 4th Cir., interpreting Va. statute, 107 Fed. (2nd) 164. Cert. denied 309 U. S. 673, 84 L. Ed. 1018.) The words of a statute should be given their natural and ordinary meaning, unless contrary legislative intention plainly appears. The legislative intention should prevail over literal sense and strict letter and terms used. (*Franklin & P. Railway Co.* v. *Shoemaker's Committee*, 156 Va. 619, 159 S. E. 100; *Simpson* v. *Simpson*, 162 Va. 621, 175 S. E. 320. Cert. denied 295 U. S. 735, 79 L. Ed. 1683.) If a literal interpretation of any part of a statute would operate unjustly or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected. (*Haydenfeldt* v. *Daney Gold & Silver Mining Company*, 3 Otto 634, 23 Law Ed. 995; *Tillinghast* v. *Tillinghast*,

(D. C. Circuit) 25 Fed. Rep. 2nd. 531; *Buzzard* v. *Commonwealth,* 134 Va. 641, 114 S. E. 664; *Miller* v. *Commonwealth,* 180 Va. 36, 21 S. E. (2) 721; *Ferguson* v. *Ferguson,* 169 Va. 77, 192 S. E. 774.)

This statute, then, according to this Court and the Virginia court, if ambiguous, must be construed to give it the effect intended by the General Assembly, however it is expressed. It cannot be meaningless or absurd.

In the absence of clear expressions to the contrary, a law is presumed to operate prospectively only.

Hassett v. *Welch,* 303 U. S. 303, 82 L. Ed. 858, (p. 6 syl.)
Ferguson v. *Ferguson,* 169 Va. 77, 192 S. E. 774, (p. 3 syl.)
Duffy v. *Hartsock,* 187 Va. 406, 46 S. E. (2d) 570, (p. 7 syl.)
Code of Virginia of 1919, sec. 6.

We submit that the interpretation of the statute by the Court of Appeals is antagonistic to the law as determined by this Court, as well as that of Virginia.

We submit that there is no statute in Virginia permitting respondent to take by devise or bequest, but that there is a statute emphatically forbidding the taking by a theological seminary.

(4) Can Respondent Legally Take Under the Non-stock Corporation Statute in Virginia? Isn't it Bound by the General Statute Relating to Devises and Bequests for Religious Purposes and Not Otherwise?

(5) Can Respondent Legally Take Under its Charter, Since The Charter is Silent as to Purposes of Corporation and Right to Take and Since the Record Here Shows that the Deficiencies of its Incorporation Are Basic?

The Protestant Episcopal Seminary and *High School* was incorporated in 1854, while the Code of 1849, pro-

hibiting devises or bequests to theological seminaries was and is now in force. This statute thus became a part of its charter.

Assuming there was no statutory prohibition as outlined above, it could only take under its charter by devise or bequest if the provisions of the charter permit. It could not take merely because it was a corporation. Being a mere creature of the law, a corporation possesses only those properties which the charter of its creation confers upon it. *Dartmouth College* v. *Woodward,* 4 Wheat. 518, 636, 4 L. Ed. 629, 659. Corporations created by statute must depend both for their powers and the mode of exercising them, upon the true construction of the statute itself. *Bank of U. S.* v. *Dandridge,* 12 Wheat. 64, 68, 6 L. Ed. 552, 554. In *Literary Fund* v. *Dawson,* (1839), 10 Leigh (37 Va.) 147, the Virginia Court held that the Literary Fund was not authorized by its charter to take for the benefit of three separate institutions of learning and the Court suggested an amendment to the charter, which was afterwards done.

Fifield v. *Van Wyck,* (1897) 94 Va. 557, 27 S. E. 446, 450, limited the validation of any devises to purposes distinctly defined in the corporation charter.

Several amendments were gotten to the charter of the Protestant Episcopal Seminary *and High School* prior to the adoption of the Virginia Constitution of 1902. Under the latter the General Assembly was precluded from passing any law "creating private corporations or amending, renewing or extending the charters thereof." (sec. 63, sub-section 17, Const.)

Charters are to be construed most favorably to the State. (*Chevango Bridge Co.* v. *Binghamton Bridge Co.,* 3 Wall (70 U. S.) 51.)

Section 154 of the Constitution provided that by amendment all exclusive rights and privileges theretofore granted were surrendered. See *Winfree* v. *Riverside Cotton Mills,* (1912), 113 Va. 717, 75 S. E. 309.

Non-stock and stock corporations were put upon a different footing. The Virginia Court held that the stock corporation act did not apply to non-stock corporations. See *Jones* v. *Rhea,* (1921), 130 Va. 345, 107 S. E. 814. And under section 154, rights, powers and privileges not found in general laws do not exist. See *ex parte Norfolk Ry. and Light Co.,* (1925) 142 Va. 323, 128 S. E. 682.

Therefore if this 1854 corporation had any power to take, and we know of no reason why it had, then the first amendment after 1902, if amendment it be, put it under section 154. But the only power it had under the 1854 act was to appoint officers and collect money. Passing the other amendments gotten from time to time did not enlarge these purposes.

A complete new charter, divorcing the High School from the Seminary, (it being admitted in argument that the High School had an independent charter), was applied for under the guise of an amendment and granted July 31, 1923, (R. 47, et sequi.) It was then incorporated as The Trustees of the Protestant Episcopal Theological Seminary in Virginia, afterwards the words "The Trustees of the" were discarded, (R. 53.) Thus, if it did have a right to take prior to that time, because of the inclusion of the "High School" provisions of its charter, it became after this amendment a theological seminary.

This so-called amendment of 1923 is in fact a complete new charter under the new Constitution and the new non-stock corporation statute. Amendments were gotten to the new organization under the 1923 charter on June 29, 1933, and July 2, 1937.

The non-stock corporation statute says that the certificate, inter alia, shall state: (a) the name of the place where it is to be located; (b) the purposes for which it is formed; (c) the names and addresses of the trustees who are to manage its affairs for the first year of its existence; and (d) the period, if any, limited for its duration. So some effort was made to comply. But as it stands;

(a) No place of its principal office is anywhere named, either in 1923, theretofore or thereafter,

(b) *No purpose is set out.* This is fatal.

1 Fletcher on Corporations, sec. 100, p. 360

(c) The names and addresses of the trustees for the first year.

Not only is this provision not complied with, but the names of the incorporators of the Seminary and High School in 1854, seventy-five years before, are inserted. The Court will assume that all of them had then passed away.

(d) No period is given for the length of corporate existence.

There is nothing in the charter "distinctly" defining the purposes for which devises can be taken. *Fifield* v. *Van Wyck,* supra.

The granting of charter or amendment by the State Corporation Commission, under the 1902 Constitution, now in force, "is purely ministerial and it cannot refuse application" for charter. Under this new constitution, corporations have no rights, powers or privileges not found in general laws.

Ex parte Norfolk Ry. and Light Co., (1925), 142 Va. 323, 128 S. E. 602.

The reasoning of the Court of Appeals, then, that the charter of this respondent "has been acted upon by the Legislature of Virginia in the last 98 years" is a fallacious statement. The first application after the 1902 Constitution and the present statute put this respondent on a completely different footing.

Why the Court of Appeals did not follow the Virginia statute, as interpreted by the Virginia Court, when the cases were called to its attention, is one of the enigmas of the times. Certainly up to this time the petitioner's rights have been completely disregarded.

It is respectfully submitted that if ever a strong petition was ever filed, there is here presented a proper occasion for the exercise of the supervisory power of this Court.

AGRA B. WILLIAMS, *Petitioner,*

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IN THE

Supreme Court of the United States

OTOBER TERM, 1952

No. 311

AGRA B. WILLIAMS,
Petitioner,

v.

PROTESTANT EPISCOPAL THEOLOGICAL SEMINARY IN VIRGINIA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF OF RESPONDENT PROTESTANT EPISCOPAL THEOLOGICAL SEMINARY IN OPPOSITION.

OPINIONS BELOW.

The memorandum opinion of the United States District Court for the District of Columbia appears on pages 62-66 of the Record. The findings of fact and the conclusions of law are at pages 66-69 of the Record. The opinion of the Court of Appeals (R. 81) has not yet been reported.

JURISDICTION.

The judgment of the Court of Appeals was entered June 12, 1952 (R. 87). The petition for writ of certiorari was filed August 29, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

STATUTES INVOLVED.

The pertinent statutes of Virginia are set forth in the Appendix, *infra*, pp. 14-18.

QUESTION PRESENTED.

Whether, under the law of the Commonwealth of Virginia, an incorporated theological seminary has the power to take a bequest.

STATEMENT.

Mary E. Maxwell, domiciled in the District of Columbia, died on March 1, 1949 (R. 66). Under the residuary clause of her will, Item XXVII, the testatrix gave, devised, and bequeathed one-half of her residuary estate, consisting of personal property, to "the Episcopal Theological Seminary of Alexandria, Virginia", which is admitted to be the respondent herein (R. 66-68). The other one-half of the residuary estate was bequeathed to The Virginia Military Institute and is not involved in the instant case (R. 67).* The respondent, Protestant Episcopal Theological Seminary in Virginia, is a non-stock and non-profit corporation of the Commonwealth of Virginia (R. 62), which was initially incorporated by the General Assembly of Virginia by an act passed February 28, 1854 (R. 27).

The testatrix directed that the Seminary's share of the

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* In *Williams* v. *The Virginia Military Institute, et al.*, No. 11175 in the United States Court of Appeals for the District of Columbia Circuit, decided July 31, 1952, the dismissal of petitioner's action against The Virginia Military Institute was affirmed.

residuary estate should be kept intact and invested by it perpetually, and that one-half of the net income arising therefrom should be used for scholarships and the remaining one-half be applied against the current expenses of the institution (R. 67).

The will was admitted to probate, and the American Security and Trust Company, a defendant in the District Court, duly qualified as executor (R. 66).

Petitioner, the next of kin and sole heir at law of the testatrix, filed her amended complaint in the United States District Court for the District of Columbia on April 17, 1950 (R. 2-8). She attacked the corporate powers of the two residuary legatees to take under a will and sought a declaratory judgment that she was entitled to the re-luum of the estate of the testatrix (R. 8). The respond- answered (R. 9-11), and the petitioner moved for summary judgment (R. 13). The respondent filed a cross motion for summary judgment (R. 14) and thereafter submitted supporting affidavits (R. 16-26).

In a memorandum opinion (R. 62-66), filed January 10, 1951, the District Court concluded that under the law of Virginia devises and bequests to incorporated theological seminaries are valid, and that the respondent is a corporation duly organized under the laws of the Commonwealth of Virginia. The petitioner's motion for summary judgment, therefore, was denied and the respondent's motion for summary judgment was granted. An order was entered which decreed that respondent was entitled to take the bequest made to it by the testatrix and dismissed petitioner's action against the respondent Seminary (R. 69-70).

From this judgment the petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit. In a unanimous opinion, (R. 81-86), handed down June 12, 1952, that Court affirmed the District Court

and held that under Virginia law the respondent had the capacity to take the bequest. It succinctly analyzed the pertinent Virginia statutes and concluded that they clearly permitted a corporate theological seminary to receive by devise or bequest an educational or charitable donation.

ARGUMENT.

The sole issue presented by this case, whether under Virginia law an incorporated theological seminary has the capacity to receive a bequest, has been passed upon by the District Court and the Court of Appeals. Both courts analyzed the applicable statutes and decisions of Virginia and very rightly concluded that nothing in the law of this Commonwealth precludes the respondent from taking by will. Strictly speaking the exact point in controversy has not been determined by the Supreme Court of Appeals of Virginia, the court of last resort of this State, but its decisions bear so closely upon the precise question here that they leave no doubt of the correctness of the decisions in the two courts below. The petitioner cannot produce a Virginia case which holds that a testamentary gift to an incorporated seminary or similar body corporate is invalid. Nor can the petitioner even cite a Virginia decision that a charitable bequest, religious or otherwise, to a corporation for purposes within the scope of its incorporation is invalid. This case has been correctly settled below; there is no conflict between the Court of Appeals for the District of Columbia and the Supreme Court of Appeals of Virginia; and there is no reason for a review by this Court.

1. As recognized by an unbroken line of Virginia decisions the respondent Seminary can take and hold a testamentary gift by virtue of its charter granted by the General Assembly of Virginia and by virtue of the law of

Virginia, both statutory and decisional. Under its charter of 1854 the respondent (herein sometimes called the Seminary) is empowered by the Virginia Legislature "to hold, receive and purchase" lands, tenements, money and other chattels and to manage and dispose of the same (R. 27). In addition Va. Code, § 13-19 confers upon corporations generally the power to hold real and personal estate for corporate purposes and states that the "power to hold real and personal estate shall include the power to take the same by gift, devise, or bequest" (Appendix p. 14). And Va. Code, § 13-224 endows non-stock corporations specifically with the power "to take and to hold by gift, purchase, grant, devise or bequest, any property —real, personal, or mixed—and to dispose of the same at pleasure" (Appendix, p. 15).

2. A charitable bequest or devise to a corporation for purposes within its corporate powers has always been upheld in Virginia. *Gallego's Ex'ors.* v. *The Attorney General,* 3 Leigh (30 Va.) 450 (1832); *Roy's Ex'ors.* v. *Rowzie,* 25 Gatt. (66 Va.) 599 (1874); *Protestant Episcopal Education Society* v. *Churchman's Reps.,* 80 Va. 718 (1885); *Trustees* v. *Guthrie,* 86 Va. 125, 10 S. E. 318 (1889); *Fifield* v. *Van Wyck,* 94 Va. 557, 27 S. E. 446 (1897); *Jordan* v. *Richmond Home,* 106 Va. 710, 56 S. E. 730 (1907); *Jordan* v. *Universalist General Convention Trustees,* 107 Va. 79, 57 S. E. 652 (1907); *Fitzgerald* v. *Doggett's Ex'or.,* 155 Va. 112, 155 S. E. 129 (1930); *Moore* v. *Perkins,* 169 Va. 175, 192 S. E. 806 (1937).

In *Fitzgerald* v. *Doggett's Ex'or.,* 155 Va. 112, 124, 155 S. E. 129 (1930), the Supreme Court of Appeals of Virginia took the occasion to review the prior Virginia cases on the subject of charitable trusts and thus summarized its conclusion:

> "These decisions establish that the law in Virginia, independent of the statute, is that an indefinite charity, educational, religious, or otherwise, made to an individual or to an unincorporated body, is invalid upon the ground of indefiniteness and uncertainty, but an indefinite charitable bequest or devise to an incorporated body having the same corporate powers or functions as the general object of the testator's bounty is valid."

Roy's Ex'ors. v. *Rowzie,* 25 Gratt. (66 Va.) 599 (1874) upheld the validity of a bequest by a Virginia resident to a theological seminary incorporated and situated in South Carolina. The same contentions were advanced as the petitioner is now making and our Court of Appeals met them with these words:

> "There is certainly nothing in the constitution which inhibits a bequest to a theological seminary; and we have seen that there is nothing in the statute law which inhibits a bequest to such a seminary if it be incorporated. Nor is there anything in the policy of our law, as has been argued, which can make such a bequest unlawful." 25 Gratt. (66 Va.) at 611.

Thereafter in its opinion the court alluded to the respondent in the instant case by name and made the following statement:

> "The law has left unaffected the right to make a bequest for a certain and definite object, though it be a theological seminary; and if such a right be not in pursuance of the policy of the law, it is certainly not contrary to it. The sense of the legislature on this subject, as was well said in argument by the counsel for the appellants, appears from the act passed February 28, 1854, entitled 'an act incorporating the Protestant Episcopal Theological Seminary and High School in Virginia.' Acts of Assembly, 1853-'4, p. 65,

chap. 107. Suppose the bequest in this case had been made to that corporation, instead of the corporation of 'the Southern Baptist Theological Seminary,' would anybody have doubted its validity? or, suppose the Southern Baptist Theological Seminary had been incorporated by the State of Virginia instead of South Carolina, and the bequest in this case had been made to it, would anybody have doubted its validity? These questions must be answered in the negative." 25 Gratt. (66 Va.) at 611-612.

In *Gallego's Ex'ors.* v. *The Attorney General,* 3 Leigh (30 Va.) 450 (1832), Virginia followed the lead of Chief Justice Marshall in *Baptist Association* v. *Hart's Ex'ors.,* 4 Wheat. 1 (1819), and held that independently of statute charitable bequests and devises to unincorporated associations could not be sustained by courts of equity. Our Court of Appeals has adhered to this rule in spite of Mr. Justice Story's opinion in *Vidal* v. *Girard's Ex'ors.,* 2 How. 127, 11 L. Ed. 205 (1844), which on the basis of "more satisfactory sources of information" held erroneous the conclusion of *Baptist Association* v. *Hart's Ex'ors.* See *Moore* v. *Perkins,* 169 Va. 175, 192 S. E. 806 (1937). The *Gallego* case, however, made clear that "a bequest to a corporation capable to take, is and always was valid as a charitable gift." 3 Leigh (30 Va.) at 468.

To remedy the effect of *Gallego's Ex'ors.* v. *The Attorney General,* 3 Leigh (30 Va.) 450 (1832), the General Assembly of Virginia on April 2, 1839, passed an act entitled "An ACT concerning devises made to schools, academies and colleges." The petitioner relies heavily upon this statute, and for that reason it is set out in full in our appendix at pages 16-18. This act with its subsequent amendments and codifiers' changes did not have the effect of validating devises or bequests to charitable corporations. Such testamentary gifts had been valid in Virginia prior to this

statute and continue to be valid today. The act, as is apparent from a reading of its first section, was to validate devises and bequests for the establishment of unincorporated schools and charitable trusts for the education of free white persons. It did not have reference to incorporated schools of any kind.

The legislature, moreover, excepted from the operation of this enabling statute unincorporated theological seminaries. Only incorporated seminaries, the charters of which expressly limited their holdings, could receive devises and bequests; thus the legislature kept control over the amount of property which could be accumulated in the hands of these institutions.

Through successive amendments and revisions this enabling statute evolved as Section 55-26 of the Virginia Code of 1950 and has remained unchanged since the death of the testatrix. It now reads as follows:

> "§ 55-26. **Validity.**—Every gift, grant, devise or bequest which, since April second, eighteen hundred and thirty-nine, has been or at any time hereafter shall be made for literary purposes or for the education of white persons within this State and every gift, grant, devise or bequest which, since April tenth, eighteen hundred and sixty-five, has been or at any time hereafter shall be made for literary purposes or for the education of colored persons within this State, and every gift, grant, devise or bequest made hereafter for charitable purposes, whether made in any case to a body corporate or unincorporated, or to a natural person, shall be as valid as if made to or for the benefit of a certain natural person, except such devises or bequests, if any, as have failed or become void by virtue of the seventh section of the act of the General Assembly passed on April second, eighteen hundred and thirty-nine, entitled 'an act concerning devises made to schools, academies, and colleges.'

> Nothing in this section shall be so construed as to give validity to any devise or bequest to or for the use of any unincorporated theological seminary. (Code 1919, § 587.)"

The changes in phraseology through the various revisions and codifications clearly show that this statute at no time invalidated bequests or devises to an incorporated theological seminary. See Acts of Assembly 1840-41, Chap. 26, p. 52; Sec. 2, Chap. 80 of the Virginia Code of 1849; Sec. 2, Chap. 80 of the Virginia Code of 1860; Sec. 2, Chap. 77 of the Virginia Code of 1873; Sec. 1420 of the Virginia Code of 1887; Section 587 of the Virginia Code of 1919; Section 55-26 of the Virginia Code of 1950.

In *Roy's Ex'ors.* v. *Rowzie,* 25 Gratt. (66 Va.) 599, 610 (1874) the Supreme Court of Appeals of Virginia traced the legislative development of this statute and said of the exclusion of unincorporated seminaries from its effect:

> "But certainly that exception to an exception cannot have the effect and could never have been intended to make invalid a definite bequest to an incorporated theological seminary, expressly authorized by its charter to take and hold property given to it by bequest or otherwise. Such a bequest had always been valid in this state if not everywhere else. The purpose of the acts of 1839 and 1841 was to make valid a certain class of donations which had never been valid before, but to make an exception in that case only of a theological seminary. They were enabling acts, which were not to extend to a theological seminary; but certainly they were not intended, and cannot have the effect to disable an incorporated theological seminary to take and hold property according to its charter, which it had always before a perfect right to do."

The legislature of Virginia has definitely accepted this interpretation when it ends the present statute by saying:

> "Nothing in this section shall be so construed as to give validity to any devise or bequest to or for the use of any unincorporated theological seminary."

Petitioner, however, contends that devises and bequests to an incorporated theological seminary are invalidated by the previous clause of the statute:

> "except such devises or bequests, if any, as have failed or become void by virtue of the seventh section of the Act of the General Assembly passed on April second, eighteen hundred and thirty-nine, entitled 'an act concerning devises made to schools, academies, and colleges'."

This language, as both the District Court and the Court of Appeals recognized, is in the past tense, "have failed or become void." It does not refer to such devises or bequests as shall fail or become void in the future. By the seventh section of the Act of April 2, 1839, it was provided that in certain cases a devise or bequest was to fail if the legislature refused to incorporate within a certain time the object of the testator's charity. This requirement was eliminated by the Virginia Code of 1849, but those devises and bequests which had been invalidated because of the failure of the legislature to act were to remain void. See *Kelly* v. *Love's Adm'r.*, 20 Gratt. (61 Va.) 124, 132-13 (1870).

In short, an incorporated theological seminary in Virginia could take by devise or bequest at common law, could take after the passage of the Act of April 2, 1839, and can take today.

3. The Seminary is still operating under its original charter of 1854. Under that charter it was empowered by the legislature to hold and receive lands, money and other

chattel and to dispose of and manage the same as might seem best; to appoint professors, tutors and other proper officers; to make and establish by-laws, rules, and regulations consonant with the laws of Virginia and the United States (R. 27-29). Later amendments conferred upon the corporation the power to grant degrees and raised the total amount of real estate which it might receive and hold to five hundred acres and the personal property to three million dollars (R. 29-59).

The purposes of the corporation are apparent from a reading of the entire charter. As revealed in its name its purpose is to operate an Episcopal theological seminary, and for that purpose its charter granted it the powers incident thereto. A "seminary" has been defined as a place of education, as a school, academy, college or university where persons, especially the young, are instructed in the several branches of learning to prepare them for their future profession. Specifically a seminary is a school for the education of men for the priesthood or ministry, and this nature of the word is made crystal clear where the word "theological" precedes the word "seminary". The origin of "seminary" seems to imply a place where the seeds of education are sown and implanted. 39 Words and Phrases 585, 586, 41 Words and Phrases 525; see also Vol. IX of The Oxford English Dictionary at pp. 442-443.

Petitioner apparently is advancing the contention that upon obtaining an amendment to its charter after the year 1902 a Virginia corporation must obtain an entirely new certificate of incorporation which contains all the provisions required for corporations initially chartered after the year 1902; hence failure to do so will abrogate its charter. There is absolutely no basis for this contention.

When the respondent was chartered in 1854 all charters of incorporation were granted by the Legislature of Virginia. In 1902 the State Corporation Commission was established, and subsequent to that date all charters and amendments to outstanding charters have been issued by the Commission. When, however, an amendment to an existing charter is sought there is no requirement that a corporation must obtain an entirely new certificate of incorporation which contains the provisions required for corporations created originally after 1902. Under the Virginia Code and the actual practice of the State Corporation Commission a charter may be amended section by section. When amended the particular section must be in the form required by the present law, but the entire charter need not be. Va. Code, §§ 13-37, 13-228.

On p. 23 of her petition the petitioner makes a very misleading and unfounded allegation by describing the 1923 amendment to the respondent's charter as "a complete new charter". The amendment of 1923 was not a new charter. It was an amendment and nothing more. The principal effect of the amendment was to change the name of the corporation from "The Trustees of the Protestant Episcopal Theological Seminary and High School in Virginia" to "The Trustees of the Protestant Episcopal Theological Seminary in Virginia". The purpose of the amendment was to release the Episcopal High School from its unity with the Seminary and to allow it to go on its own individual way. The Seminary continued under its original charter as is best shown by the language of the amendment itself. (R. 42-48).

4. The petitioner has also raised the question as to whether the courts below could consider the affidavits filed by the respondent with its cross motion for summary judg-

ment. The petitioner's position on this point is that wherever the affidavits tended to sustain respondent's case they were useless, but wherever they contained material upon which the petitioner wished to rely they were worthy of consideration by the courts. Actually all the affidavits should have been considered as they were not denied. 3 Barron and Holtzoff, *Federal Practice and Procedure*, § 1234, § 1237. The question, however, is moot as the issues in this case were fully before the District Court and the Court of Appeals whether they took account of all the affidavits, or of none of them or of just those parts which were agreeable to the petitioner.

CONCLUSION.

This case has been thoroughly considered and passed upon by the District Court and the Court of Appeals. Both courts correctly decided the case in conformity with the law of Virginia, which is well settled on the point involved. A further review is totally unwarranted and there is nothing to invoke the supervisory power of this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX.

VIRGINIA CODE OF 1950:

§ 13-19. General Powers of Corporations.—Every corporation of this State shall have power:

* * *

(4) To contract and be contracted with, to purchase, hold, and grant such real and personal estate as the purposes of the corporation shall require, and all other real estate which shall have been bona fide conveyed or mortgaged to the corporation, or for its benefit, by way of security, or in satisfatcion of debts, or purchased at sales upon judgment or decree obtained for such debts; and to mortgage or pledge, or convey by way of deed of trust, or otherwise encumber any such real or personal estate as is mentioned in this paragraph, together with the franchise of such corporation, in whole or in part. The power to hold real and personal estate shall include the power to take the same by gift, devise, or bequest.

* * *

(12) To exercise all other powers granted to corporations generally by the laws of this State. (Code 1919, § 3777; 1922, p. 783; 1928, p. 1004; 1938, p. 488; 1946, p. 111.)

§ 13-224. When Corporate Existence Commences; Powers of Corporation.—As soon as the charter has been so issued and admitted to record by the Commission in its office, the persons who signed and acknowledged the certificate and such other persons as may be associated with them according to the provisions of law, or of their charter, and their successors, shall be a body politic and

corporate by the name set forth in the certificate; and as such shall have power:

* * *

(7) To take and to hold by gift, purchase, grant, devise or bequest, any property—real, personal, or mixed —and to dispose of the same at pleasure.

* * *

In addition, such corporation shall exercise any corporate powers necessary to the exercise of the powers above enumerated and given, and shall have all the general powers and be subject to all the general restrictions and liabilities conferred and imposed by this chapter, and by the general laws of this State applicable thereto. (Code 1919, § 3874; 1944, p. 9.)

§ 55-26. Validity.—Every gift, grant, devise or bequest which, since April second, eighteen hundred and thirty-nine, has been or at any time hereafter shall be made for literary purposes or for the education of white persons within this State and every gift, grant, devise or bequest which, since April tenth, eighteen hundred and sixty-five, has been or at any time hereafter shall be made for literary purposes or for the education of colored persons within this State, and every gift, grant, devise or bequest made hereafter for charitable purposes, whether made in any case to a body corporate or unincorporated, or to a natural person, shall be as valid as if made to or for the benefit of a certain natural person, except such devises or bequests, if any, as have failed or become void by virtue of the seventh section of the act of the General Assembly passed on April second, eighteen hundred and thirty-nine, entitled "an act concerning devises made to schools, academies, and colleges." Nothing in this section shall be so construed as to give validity to any devise or bequest to or for the use of any unincorporated theological seminary. (Code 1919, § 587.)

Acts of the General Assembly of Virginia of 1839.

Chap. 12.—An ACT concerning devises made to schools, academies and colleges. (Passed April 2, 1839.)

1. *Be it enacted by the general assembly,* That all devises or bequests of lands, tenements, hereditaments, goods and chattels, stocks and choses in action, hereafter given or made, for the establishment or endowment of any unincorporated school, academy or college within this commonwealth, for the education of free white persons, shall be good and valid in law and equity except as is hereinafter provided.

2. *And be it further enacted,* That if in the will containing such devises or bequests, the testator shall appoint a trustee or trustees to execute such devises or bequests, such trustee or trustees, or those of them who may act, shall have the same right and power to maintain any suit at law, or in equity, that he or they would have had if the beneficiaries had been a certain natural person.

3. *And be it further enacted,* That if the trustee or trustees appointed by the will shall decline to act, or if no trustees shall be appointed in the will, the circuit superior court of law and chancery, having jurisdiction, shall have full power to appoint a trustee or trustees to carry such devise or bequest into execution; and such trustee or trustees shall have the same rights and powers as if he or they had been appointed by the will.

4. *And be it further enacted,* That if any will containing devises or bequests for the establishment or endowment of any school, academy or college, shall be admitted to probate in any of the courts of this commonwealth, other than the circuit superior court of law and chancery, it shall be the duty of the clerk of such court to certify the fact of such probate, and send an attested copy of the will to the circuit superior court of

law and chancery having jurisdiction over the place of granting the certificate of probate as aforesaid.

5. *And be it further enacted,* That at the term at which the copy of such will and certificate of probate aforesaid may be received, or at which any such will may be admitted to probate in the said circuit superior court of law and chancery, it shall be the duty of the court to appoint commissioners to ascertain the character and value of the estate devised or bequeathed.

6. *And be it further enacted,* That all suits brought by any person or persons to impeach the validity of such devise or bequest shall be brought in the said circuit superior court, and the commonwealth shall be made a party defendant thereto, and it shall be the duty of the attorney for the commonwealth in said court to defend such suit. And in any case in which the said attorney may consider it necessary, he shall have authority, and it is hereby made his duty to institute in the name of the commonwealth any proceedings to obtain the probate of any will containing such devise or bequest, or to appoint trustees to execute the same, or to enforce the faithful execution of the trust imposed on such trustees. The court shall, out of the amount of such devises or bequests, if recovered, allow the said attorney such fee as may be deemed reasonable.

7. *And be it further enacted,* That at the term next ensuing the admission of such will to probate, or next ensuing the reception of the said copy of the will and certificate of the probate aforesaid, the said court shall report the case to the legislature, together with the report of the commissioner or commissioners appointed to ascertain the value of the subjects, or estate devised or bequeathed, with any other matter it may think proper. And if the legislature shall refuse at its next session, or fail within two successive sessions after the reception of the said report from the court aforesaid, to incorporate such school, academy or college, the said devise or be-

quest shall fail and be void. But no act incorporating such school, academy or college, shall take away any right of the heirs or distributees to impeach the validity of such devise or bequest, which they would have had if it had been given or made to any natural person or body incorporated at the time of making the devise or bequest; *Provided*, That nothing in this act contained shall be so construed as to give validity to any devise or bequest to any theological seminary.

8. This act shall be in force from the passing thereof.

DARK PAGE BLEED THRU

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Supreme Court of the United States

October Term, 1952

No. 311

AGRA B. WILLIAMS, *Petitioner,*

v.

PROTESTANT EPISCOPAL THEOLOGICAL SEMINARY, IN VIRGINIA, ET AL., *Respondent.*

Petition for Rehearing from the Order of the Court Denying the Application for Writ of Certiorari.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

In spite of the fact that petitions for rehearing are usually denied, yet, so confident is the writer that the petition for writ of certiorari should have been granted, that petitioner is again at the bar of this Court, praying that the order of the Court of October 27, 1952, may be rescinded and the writ granted.

We filed another petition growing out of this case, which we appealed from the same Court, upon a hearing

before the same judges, which is No. 427, on the October docket. In that case, the Court affirmed the lower Court, because it said that the proceeding by declaratory judgment was addressed to the discretion of the trial court. It took no such action, so far as the case (No. 311) was concerned. In the No. 427 case, the Court, inferentially, directed us to try our case in the courts of Virginia, where neither fund nor persons could be found.

In this case, the same judges decided that it could hear the case upon the decision of the District Court and did so.

There is a complete contradiction upon the same question, growing out of the residuary clause of the same will, before the same court.

We ask this Court to grant the writ for the following reasons:

First: The Court of Appeals refused to pass upon the question of affidavits filed by the Theological Seminary. We asked, as a matter of law, because it was apparent that the Court disregarded our objections to these affidavits. This question was not passed upon. The brief of the Theological Seminary urged that because we did not answer these affidavits, they should be considered. Affidavits may be used for the purpose of discovering whether there is an issue of fact, but not for the purpose of deciding an issue of fact. *Farrall* v. *D. C. Amateur Athletic Union*, 80 U. S. App. D. C. 396, 153 Fed. (2nd) 647. They must be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show that affiant is competent to testify as to such matters. *Fox* v. *Johnson Wimsott*, 31 Fed. Supp. 64. See also *Dewey* v. *Clark*, 86 U. S. App. D.C. 137, 180 Fed. (2nd) 766.

Every one of these affidavits violated the hearsay rule. The Circuit Court of Appeals for the District of Columbia

had passed upon the questions arising out of these affidavits. We called the cases to its attention. Each of them was "window dressing."

Second: The Circuit Court of Appeals said that the bequest was good under sec. 587 of the 1942 Code, which is sec. 55-26 of the 1950 Code.

Notwithstanding the urging of counsel for the Theological Seminary, that this bequest was good at common law, that statement is completely at variance with the finding of Judge Tucker in *Gallego's Exors.* v. *The Attorney General,* 3 Leigh 450 (1832), on page 475. This case was recognized and followed in *Fitzgerald* v. *Doggett's Exors.,* (1930) 155 Va. 112, 155 S. E. 129, 132. On page 132, the Court held that the Act of 1839, so frequently referred to, expressly provided "that the Act should not apply to theological seminaries."

Judge Eggleston, in *Triplett* v. *Trotter* (1937), 169 Va. 440, 193 S. E. 514, recognized that the language of the Act then in force, which is the same Act passed upon by the District of Columbia Court of Appeals, that the exclusion of a theological seminary still existed.

In 1 Harrison on Wills 438, which was written in 1927, the standard authority on wills and administration in Virginia and West Virginia, Judge Harrison held that an educational and literary trust did not include a theological seminary.

The text in Harrison on Wills was quoted and approved in *Moore* v. *Perkins* (1937) 169 Va. 175, 192 S. E. 806, 811.

Never, in the Virginias, has a bequest for a theological seminary in Virginia been held valid.

The Circuit Court of Appeals quoted the present Virginia statute, with relation to gifts and grants for educational and literary purposes and held that it applied to devises to theological seminaries. The Virginia Court

has held directly the opposite. *Fifield* v. *Van Wyck*, 94 Va. 557, 27 S. E. 446, 450; *Moore* v. *Perkins*, (1937) 169 Va. 175, 192 S.E. 806, 811. These cases hold that the statute in question applies to educational and literary trusts and does not apply to religious trusts.

We owe an apology to the Court because we neglected, in our former brief for the petition, to emphasize and to call to the Court's attention the fact that the seventh section of the Act of the General Assembly, passed on April 2, 1839, provided that devises or bequests, if any, as have failed or become void, should be excepted; and the Circuit Court of Appeals did not take into consideration the proviso of that seventh section, which is as follows:

> *"Provided, that nothing in this Act contained shall be so construed as to give validity to any devise or bequest to any theological seminary."*

Afterwards, as we called to the Court's attention in our note upon the petition for the writ, the other exception as to an unincorporated theological seminary was added in the Code of 1887, following *Kain* v. *Gibboney*, 11 Otto 362, 25 Law Ed. 813. So, that proviso, that excepted theological seminaries from taking, is still in the Virginia law. We apologize for not calling this fact more specifically to the Court's attention. The Act, as it stands today, excepts from its provisions both incorporated and unincorporated theological seminaries.

Whatever may have been the various changes made from time to time in this Act, the Code of 1919 provided exactly the language of the Act of 1839. Under that act, theological seminaries were excepted, and under the Act of 1887, unincorporated theological seminaries were excepted. It was unquestionably before the legislative eyes that an opportunity and opening had been made in *Kain* v. *Gibboney* for an unincorporated theological seminary, under the auspices of any church, to be validated.

It must be apparent that under the present statute only devises or bequests that failed were those to a theological seminary. The Virginia Court recognizes this fact.

Campbell, C. J., in *Moore* v. *Downham*, 166 Va. 77, 184 S. E. 199, says that "The language of the statute is plain, clear and unambiguous."

In *Protestant Episcopal Education Society* v. *Churchman*, 80 Va. 718, Judge Richardson said:

> "The said seventh section is broad and comprehensive in its terms. It makes valid every transfer of property, real and personal (other than for the use of a theological seminary)", etc.

Even in *Rowe* v. *Rowzie* (1874) 25 Gratt. 599, so heavily relied upon by the Seminary, Judge Moncure, speaking of the 1939 Act (p. 610), said:

> "We think its only purpose was and only effect is to make valid a certain class of indefinite charities, to-wit: charities for literary purposes, but to except from that class thus made valid an indefinite charity to a theological seminary," etc.

In *Moore* v. *Perkins* (1937), 169 Va. 175, 192 S.E. 806, 811, referring to this statute, and quoting from *Kelly* v. *Love's Admr.*, 20 Gratt. 124, says:

> "I think the object of the Legislature, in passing the act, was to change the rule of law laid down in the cases before cited • • • controlling bequests and devises for the establishment of schools and colleges, leaving it in full effect and operation, so far as it applied to bequests and devises for religious purposes. • • • Notwithstanding the fact in the two cases, members of the court had criticized the opinion in the Gallego case • • • the marked distinction in the acts of General Assembly in dealing with trusts for religious purposes and trusts for other charitable purposes has been rigidly maintained. • • • It could hardly be the intent of the Legisla-

> ture, in the use of the words 'charitable purposes,' as set forth in section 587, to remove all restrictions upon trusts for religious purposes without specifically amending other sections of the Code dealing with the subject."

In *Triplett* v. *Trotter* (1937) 169 Va. 440, 193 S. E. 514, 516, Mr. Justice Eggleston, construing this very statute, inter alia, says that while the language is changed and broadened, "The exception of a theological seminary would indicate that the legislative intention was still directed to the location of the institution, and not to the residence of the beneficiaries in Virginia."

See, also, *Maguire* v. *Lloyd,* 193 Va. 138, 67 S.E. (2nd) 885, quoted from in our petition, which held, among other things, that charitable trusts do not include religious trusts and that there is a difference between them and the law applicable thereto so far as Virginia is concerned.

Indeed, ever since the statute was last changed there is a general recognition by the Virginia Court, as well as Virginia lawyers, that theological seminaries cannot take by bequest or devise in Virginia.

It must be apparent that under the statute theological seminaries being excepted, any devise or bequest failed as soon as the time arrived for the devise or bequest to become effective. We urge that the present statute is based on the seventh section of the 1839 act. It covered an exception as to theological seminaries, so often urged. That exception is still in the statute. It becomes operative as soon as any devise or bequest to a theological seminary is made and becomes effective. The act then operates prospectively, and the cases cited in our petition apply.

Under the statute in force when Miss Maxwell died (Code 1919, sec. 38) property could be acquired for re-

ligious purposes for (a) place of public worship; (b) cemetery; (c) residence of minister; (d) residence of bishop or other similar officer; (e) parish house; (f) sexton of church, adjacent to the church. No statute authorizes devises or bequests for theological seminaries incorporated or unincorporated. Incorporated seminaries is included in section seven and unincorporated by amendment.

If Virginia desires to change this law and apparently it does not, the General Assembly, as its Court says, should do it and not the court.

We urge again that the defendant is not properly incorporated and therefore cannot take under its charter. We urge each and every proposition formerly suggested in our petition.

AGRA B. WILLIAMS, *Petitioner,*

By AUSTIN F. CANFIELD
WILLIAM T. HANNAN
CLARENCE E. MARTIN
CLARENCE E. MARTIN, JR.
Attorneys for Petitioner

I, Clarence E. Martin, a member of the bar of the Supreme Court of the United States, certify that this petition for rehearing is presented in good faith, and, also that the additional ground, to-wit the inconsistent action of the Circuit Court of Appeals in No. 427, now pending here; the law relating to affidavits of appellee here; the additional proposition with reference to the interpretation of the statute involved; the contradiction between the law as recognized by the Supreme Court of Appeals of Virginia and the Circuit Court of Appeals of the District of Columbia.

This 7th day of November, 1952.

/s/ CLARENCE E. MARTIN